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No. 445

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

FLOY P. BALDWIN, PETITIONER,

VS.

IOWA STATE TRAVELING MEN'S ASSOCIATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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DENTON DUNN,
Of Counsel.

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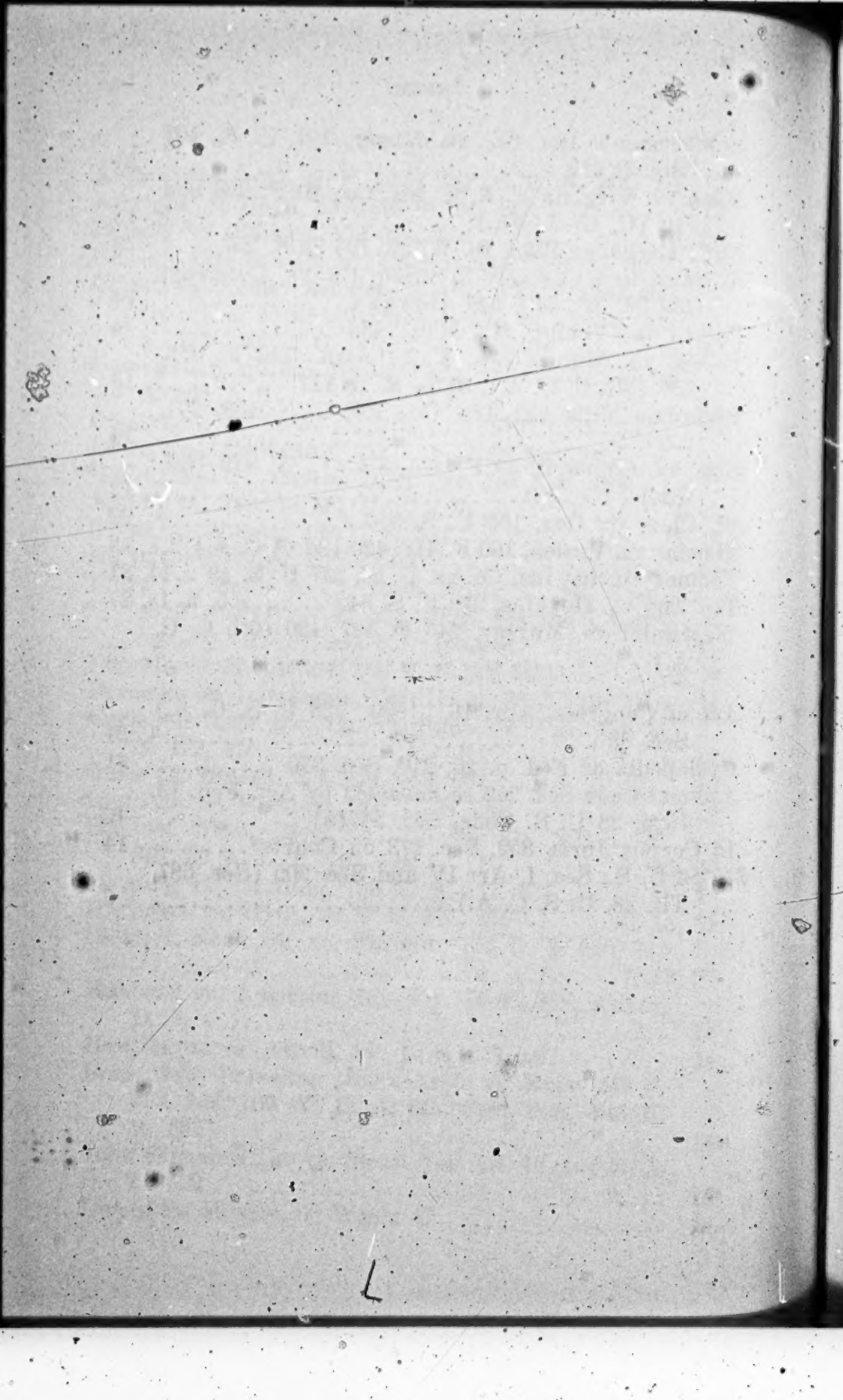

No. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

FLOY P. BALDWIN, PETITIONER,

VS.

IOWA STATE TRAVELING MEN'S ASSOCIATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Floy P. Baldwin, respectfully shows as grounds for the issuance of a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit:

A.

Summary Statement of the Matter Involved.

Floy P. Baldwin, petitioner, instituted an action on an insurance policy in the state court of Missouri. On respondent's petition, it was removed to the United

States District Court at Kansas City, Missouri. Respondent appearing specially, moved the quashal of service. After full hearing on both the facts and the law, said motion was overruled. Judgment was later rendered for petitioner for eight thousand two hundred forty ($8,240.00) dollars on respondent's default. No appeal was prosecuted and petitioner being unable to collect in the State of Missouri, instituted this secondary action on the above judgment in the Iowa Federal Court, which after sanctioning a collateral attack by respondent upon said judgment, rendered judgment against the validity of said prior judgment, which was affirmed by the Circuit Court of Appeals, Eighth Circuit.

By this decision rendered on March 29, 1930, a timely motion for rehearing being overruled on June 11, 1930, the United States Circuit Court of Appeals for the Eighth Circuit in affirming the judgment for defendant by the United States District Court for the Southern District of Iowa in this suit on a judgment of the United States District Court for the Western District of Missouri, determined that *collateral attack* upon an authenticated judgment of a United States District Court, sued on in another state, was permissible, under the Constitution and Laws of the United States, for alleged want of jurisdiction of the defendant corporation in the court *a quo*, although the defendant had appeared therein specially to present such question, had had a full hearing thereon of both facts and law by such court having jurisdiction of the subject-matter of the suit, and had permitted such court's decision ad-

verse to it and final judgment thereon to stand unreversed (R. 53).

That said Circuit Court of Appeals further held that "if the judgment had been recovered in a state court of Missouri, the situation might be different," but that "Such is not the rule in the federal courts" (R. 54); and "that, where the question of jurisdiction of the person has been raised (by the defendant) and determined in the court wherein the judgment, upon which suit is brought, was entered," your petitioner's contention that "there can be no examination of the matter in any other court," (except on appeal or writ of error), "is not well founded" (R. 56).

After your petitioner had offered in evidence without objection the authenticated judgment sued on showing therein defendant's overruled motion to quash, the main question arose on the record herein by the trial court's overruling plaintiff's objection to the introduction of evidence under defendant's answer attacking the judgment court's jurisdiction of its person (R. 10-13), on the ground that such answer did not state facts sufficient to constitute a defense to the petition of plaintiff (R. 38), and by like overruling of plaintiff's objections that all defendant's evidence offered attempted to make a collateral attack upon the valid judgment sued upon and to readjudicate issues already adjudicated *inter partes* in the said judgment, and was incompetent, irrelevant and immaterial to any issue in the case (R. 39-40). The trial court's position is shown by its admission for the defendant over plaintiff's objections not only of immaterial portions of the record proper of

the case of the judgment sued on, but also one only of the several affidavits filed on the motion to quash, though not shown to have been incorporated in the record by bill of exceptions (R. 40), and also by its overruling objections to the defendant's secretary's testimony seeking to show that defendant had never done any business in Missouri, nor ever had any agent there, the identical issues adjudged against defendant on its motion to quash (R. 41) in the court *a quo*, and herein decided to the contrary by the trial court's judgment affirmed by the Circuit Court of Appeals. Plaintiff's exceptions to all such rulings were saved (R. 47) and covered in her assignments and specifications of error (R. 23).

The fundamental question involved then is whether the courts of the United States recognize in such a case the rule of *res judicata*, or estoppel by judgment, *inter partes*, as distinguished from purely *ex parte* proceedings in the court of first instance, and do not permit a retrial of issues already adjudicated *inter partes*.

A secondary question of federal practice was also involved by the defendant's having, after quashal of the first service and before the second service in the case (afterwards sustained), *sua sponte* filed its motion in the court *a quo* to dismiss for lack of diligent prosecution by plaintiff, and said Circuit Court of Appeals further holding that such a motion, although overruled, was not a general appearance (R. 54), as your petitioner contended it was by virtue of the Act of Congress of April 16, 1920 (28 U. S. C. A., Sec. 83), allowing the retention of jurisdiction by district courts

of removed cases after quashal of service therein for the issuance of new process where desired by the plaintiff.

B.

Reasons Relied on for Allowance of the Writ.

Your petitioner contends that a writ of certiorari should be allowed and that the decision of the Circuit Court of Appeals should be reversed by this court for these reasons:

1. The decision has overlooked the estoppel by judgment against the respondent in the court *a quo* upon the question of the jurisdiction of its person by reason of its appearing in said court and submitting thereto its jurisdictional objections upon the evidence of the parties, and, after the overruling of same after full hearing, allowing the final judgment, herein sued on, to go against it in the cause and stand unreversed without suing out writ of error therefrom (*Evers* v. *Watson*, 156 U. S. 527; *Forsyth* v. *Hammond*, 166 U. S. 506, 517).

2. The decision overlooks the fact that the United States District Court for the Western District of Missouri had jurisdiction of the subject matter of the suit on a $5,000.00 insurance policy of the defendant Iowa corporation brought against it by your petitioner, then a citizen of Kansas City, Missouri, in the Circuit Court of Jackson County, Missouri, and removed by the defendant to such federal court, and that therefore the latter court had jurisdiction to hear and determine defendant's motion to quash the service of summons as

made upon it in said cause, so that said court's overruling of said motion and entry of judgment thereafter in said cause in favor of plaintiff and against the defendant was a final judgment *inter partes*, subject only to review by writ of error, and not to collateral attack (*Germania Life Ins. Co. of New Orleans* v. *State of Wisconsin*, 119 U. S. 473, 476; *Harding* v. *Harding*, 198 U. S. 317, 337).

3. The decision overlooks the fact that respondent had its day in court upon its objections to the jurisdiction of its person by said Federal Court of Missouri by submitting them to such court by its motion to quash the service as made upon it therein and receiving full hearing thereon by said court, and that after said court had overruled said motion and entered final judgment in said cause in favor of plaintiff and against the defendant, respondent, when sued on said authenticated judgment in the United States District Court of Iowa, was estopped by such final judgment *inter partes*, standing unreversed and not set aside, to contend that it had not been lawfully summoned in said first court and that said judgment was rendered without due process of law, because such judgment *inter partes* adjudicated jurisdiction of the person of defendant as well as the merits (*Toy Toy* v. *Hopkins*, 212 U. S. 542; *Harkness* v. *Hyde*, 98 U. S. 476, 479).

4. The decision denies to your petitioner her rights under the Constitution of the United States as a citizen thereof, and particularly under Section I of Article IV thereof, and Section 905, Revised Statutes of the United States (Sec. 687, Tit. 28, U. S. C.

A.), requiring the duly authenticated transcript of judgment sued on and offered in evidence herein to have such faith and credit given it in every court within the United States as it had by law and usage in the court of the state from which it was taken, in that under the law of Missouri, and all law, federal and state, after the overruling of defendant's motion to quash the service upon it the final judgment of said Federal Court of Missouri in pursuance thereof, was not subject to collateral attack, as allowed by the trial and appellate courts herein (*Hall* v. *Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 761, 52 A. L. R. 723, 740; *Chicago Life Ins. Co.* v. *Cherry*, 244 U. S. 25, 29).

5. The decision, in holding that a judgment of a United States District Court is not entitled to the same degree of faith and credit in another state, and the same immunity from collateral attack therein, as judgments of the state courts under similar circumstances, has determined a federal question in conflict with applicable decisions of this court, the Supreme Court of the United States (*Embry* v. *Palmer*, 107 U. S. 3. 9; *Hancock Nat'l Bank* v. *Farnum*, 176 U. S. 640, 645; *Toy Toy* v. *Hopkins*, 212 U. S. 542).

6. Said Circuit Court of Appeals has rendered a decision herein in conflict with other Circuit Courts of Appeals on the same matter (*Westwater* v. *Murray*, 245 F. 427, 430, (6th C. C. A.); *Phelps* v. *Mutual Reserve Fund Life Assn.*, 112 F. 453, 458 (6th C. C. A.), 61 L. R. A. 717; *Sipe* v. *Copewell*, 59 F. 470, 8 C. C. A. 419 (6th Cir.) *Thomas* v. *Virden*, 160 F. 418, 420

(2d C. C. A.); *Chinn* v. *Foster-Milburn Lumber Co.*, 195 F. 158, affirmed in *Foster-Milburn Lumber Co.* v. *Chinn*, 202 F. 175 (2d C. C. A.); *Moch* v. *Virginia Fire & Marine Ins. Co.*, 10 F. 696 and 710 (C. C. A. Va.) per Hughes, D. J. and Bond, Circuit Judge, in 1882, a two judge decision antedating the circuit courts of appeals.

7. Said Circuit Court of Appeals, by holding herein that a defendant can appear in a court having jurisdiction of the subject matter of the action and attack the jurisdiction of its person, and then retire with immunity after such court accords full hearing to such objections and overrules the same, and that such defendant can thereafter, when sued on the final judgment of such court rendered in pursuance of such ruling, make collateral attack on such judgment for lack of jurisdiction of its person, has decided an important question of general law in a way untenable and in conflict with all reported authority discoverable by extended research, as will be shown in our brief in support hereof.

8. The decision, in approving a retrial over the objections and exceptions of your petitioner, by a coordinate court of an identical issue already adjudicated *inter partes* by a court of competent jurisdiction, and thereby allowing the defendant another day in court on such issue, and by treating the appeal from the United States District Court for the Southern District of Iowa herein in the suit on the judgment as if it were an appeal from the United States District Court for the Western District of Missouri which

rendered the judgment sued on, has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision herein.

9. The decision overlooks the fact that your petitioner objected upon the trial and excepted to the introduction of evidence under respondent's answer seeking to make collateral attack upon the judgment sued on, on the ground that the record showed that the jurisdiction of the person of the defendant by the court *a quo* had been therein adjudicated *inter partes* upon the defendant's own motion submitted thereto, and the final judgment sued on herein had been entered in said court without reversal thereof, and that therefore it was error for the trial court herein to retry said issue so finally adjudicated and find contrary to such adjudication, as it did, over the continued objection and exception of your petitioner.

10. The decision overlooks the record fact that the evidence submitted by the parties to the court of the judgment sued on herein, was not before the trial court herein, not having been preserved of record nor offered herein, and that therefore the latter court could not pass on the same as a matter of law, even if it had jurisdiction to do so as against estoppel by final judgment *inter partes* thereon, and that the Appellate Court likewise could not on appeal pass adversely upon the primary sufficiency of such evidence to support the jurisdiction of the court *a quo*, nor pass upon the question anew upon the evidence offered by

the defendant herein over your petitioner's objections and exceptions.

11. The decision also erred in the construction of the federal law in holding that defendant's volunteer motion to dismiss in the court *a quo,* after the quashal of the first service against it and before further service attempted, was not a general appearance in said court, especially in overlooking the effect of the Act of Congress of April 16th, 1920 (28 U. S. C. A., Sec. 83), allowing the retention of jurisdiction by District Courts of removed cases after quashal of service therein for the issuance of new process where desired by the plaintiff in such cases.

12. The main question involved of the inviolability under the Constitution and laws of the United States in every court of the United States of a final unappealed judgment *inter partes* of a court of the United States, having jurisdiction of the subject matter of the action, is one of such fundamental importance in our system of jurisprudence that it ought to be declared again in this Court beyond possibility of misunderstanding by any lower court, an opportunity afforded by this application, so that no court within the United States may again put such a judgment of a court of the United States on the same or even a lower plane of faith and credit than that of a court of an alien country, as done in the case at bar.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United

States Circuit Court of Appeals for the Eighth Circuit, commanding that court to certify to and send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 8707, Floy P. Baldwin, appellant vs. Iowa State Traveling Men's Association, a corporation, appellee, and that the said judgment of the said United States Circuit Court of Appeals may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Floy P. Baldwin,

By C. W. PRINCE,
JAMES N. BEERY,
Counsel for Petitioner.

F. W. LEHMANN, JR.,
DENTON DUNN,
Of Counsel.

Supreme Court of the United States. October Term, 1930. Floy P. Baldwin, Petitioner, vs. Iowa State Traveling Men's Association, a corporation, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinions of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is reported in *Floy P. Baldwin* v. *Iowa State Traveling Men's Association, a corporation,* 40 F. (2d) 357 (R. 53). The District Court's opinion (R. 19) was not reported.

II.

Jurisdiction.

(a) The statutory provision believed to sustain jurisdiction is Sec. 240 of the Judicial Code as amended by the Act of February 13th, 1925, 28 U. S. Code, Sec. 347 (a).

(b) The judgment sought to be reversed was rendered on March 31st, 1930 (R. 56). Petition for rehearing was duly filed May 28, 1930 (R. 61), and was denied June 11th, 1930 (R. 61).

(c) The nature of the case and the rulings relied upon as the basis of this court's jurisdiction are shown in the petition for certiorari hereinbefore set forth, and hereinafter in this brief.

(d) Cases believed to sustain the jurisdiction of this court are:

Germania Life Ins. Co. of New Orleans v. *State of Wisconsin*, 119 U. S. 473, 476.
Toy Toy v. *Hopkins*, 212 U. S. 542.
Harkness v. *Hyde*, 98 U. S. 476, 479.
Embry v. *Palmer*, 107 U. S. 3, 9.
Hancock Nat'l Bank v. *Farnum*, 170 U. S. 640, 645.
Chicago Life Ins. Co. v. *Cherry*, 244 U. S. 25, 29.
Dowell v. *Applegate*, 152 U. S. 327, 337, 340.
Evers v. *Watson*, 156 U. S. 527.
Forsyth v. *Hammond*, 166 U. S. 506, 517.
Harding v. *Harding*, 198 U. S. 317, 337.
Westwater v. *Murray*, 245 F. 427, 430 (C. C. A. 6th).
Phelps v. *Mutual Reserve Fund Life Ass'n*, 112 F. 453, 458 (C. C. A. 6th), Lurton, Day and Severens, JJ., 61 L. R. A. 717.
Sipe v. *Copewell*, 59 F. 470, 8 C. C. A. (6th) 419.
Thomas v. *Virden*, 160 F. 418, 420 (C. C. A. 2d).
Chinn v. *Foster Milburn Lumber Co.*, 195 F. 158, aff. in *Foster-Milburn Lbr. Co.* v. *Chinn*, 202 Fed. 175 (C. C. A. 2d).
Moch v. *Virginia Fire & Marine Ins. Co.*, 10 F. 696 and 710 (C. C. Va.), per Hughes, D. J. and Bond, Circuit Judge.
Archer v. *Heath*, 30 F. (2d) 932 (C. C. A. 9th).
Hall v. *Wilder Mfg. Co.*, 316 Mo. 812, 293 S. W. 761, 52 A. L. R. 723, Annotation 740.
Baisley v. *Baisley*, 113 Mo. 544.
John Simmons Co. v. *Sloan*, 142 Atl. 15, 104 N. J. L. 612.
Albright v. *Boyd*, 85 Ohio St. 34, 41.
Ederheimer v. *Carson Dry Goods Co.*, 105 Ark. 488.
Gunn v. *Howell*, 27 Ala. 663, 667.

Peters v. *Young*, 122 Mich. 484.
Ex parte Kellogg, 6 Vt. 509.
Lively v. *Husely*, 60 Wash. 47.
Hubbard v. *American Inv. Co.*, 70 F. 808, Shiras, D. J.
Riverdale Mills v. *Mfg. Co.*, 198 U. S. 188, 201, 202.
Northwestern Casualty & Surety Co. v. *Conaway*, 230 N. W. 548, 549 (Iowa).
Commercial Mutual Accident Co. v. *Davis*, 213 U. S. 245.
Iowa State Traveling Men's Ass'n v. *Ruge*, 242 F. 762, 763, 765 (C. C. A. 8th, Cert. den., 245 U. S. 657).
Freeman on Judgments, Vol. III, p. 2835 (5th Ed.).
15 Corpus Juris, 852, Sec. 173 on *Courts*.
Thomas Marine Ins. Co. v. *U. S.*, 237 U. S. 19.
Huntington v. *Attrill*, 146 U. S. 657, 667.

III.

Statement of the Case.

This suit began in the United States District Court for the Southern District of Iowa (R. 2). The amended petition (R. 3) on which the case was tried, seeks recovery upon an $8,240.00 judgment, with six per cent interest per annum thereon from its rendition, with $26.80 costs, on January 4, 1927, by the United States District Court for the Western District of Missouri, Western Division at Kansas City in favor of your petitioner and against the respondent, with a transcript thereof, duly authenticated under R. S. Sec. 905, 28 U. S. C. A., Sec. 687, attached (R. 5).

The petition and exhibit show the first suit began June 9, 1922, in the Circuit Court of Jackson County,

Missouri at Kansas City, by your petitioner as beneficiary upon a $5,000.00 insurance policy of defendant, who removed the case to the United States District Court, at Kansas City, on the ground that plaintiff was a citizen and resident there, and the defendant an Iowa corporation.

That defendant appeared specially in said United States District Court, moving to quash the first service of summons, the nature of which does not appear herein, and to dismiss the cause; that October 22, 1923, said motion to quash was sustained but dismissal denied (R. 6); that June 17, 1924, defendant reciting that it appeared specially, filed its motion to dismiss the cause on the ground that plaintiff had taken no further steps or action since the quashal of service aforesaid, and that on the state of the record defendant was entitled to dismissal of the cause at the cost of plaintiff (R. 13, 14) which motion was overruled November 24, 1924 (R. 6).

That November 18, 1924, alias summons was issued in said cause and return of service by the United States marshal on O. C. Sheley as agent of defendant filed on November 10, 1924 (R. 7, 8); that on January 26, 1925, defendant filed its motion to quash said last service, reciting as grounds thereof that it was not doing business in Missouri, and that said Sheley was not its agent (R. 29, 30), which motion was argued and submitted to the court upon the affidavits and briefs filed by both parties, and was on January 26, 1926, by the court overruled and the defendant given thirty days to plead further (R. 7). That on January 4th,

1927, said court further found that defendant had failed to plead further as required, and rendered judgment by default *nil dicit* against the defendant, embodying therein its finding in the overruling of said motion to quash, that defendant was when served doing its regular business in the State of Missouri in such manner and extent as to warrant the inference of its presence there and that said Sheley so served as its agent within the jurisdiction was its proper and legal agent under the law of the forum for service in Jackson County, Missouri, and upon proof made assessed the damages aforesaid (R. 8).

The petition further alleges that defendant's so appearing, filing and submitting its motion to quash upon the evidence of both parties and suffering the same to be overruled and final judgment to be entered by said court, without suing out writ of error therefrom, finally adjudicated the jurisdiction of its person, and expressly so under the law of the forum of the court, *i. e.*, the State of Missouri by the decisions of its court of last resort (R. 4).

The answer admits and exhibits the volunteer motion to dismiss of June 17, 1924, and denies that defendant ever did business in Missouri, or that said Sheley ever was its agent, and alleges that to enforce said judgment would deprive defendant of due process of law (R. 10).

The reply is a general denial, coupled with a plea of estoppel by the judgment on the issues raised by the answer (R. 14). Written waiver of jury having been filed, plaintiff offered authenticated copies of the

judgment sued on (R. 5), of the court order overruling the special motion to dismiss (R. 29), of defendant's motion to quash of January 26, 1925 (R. 29), and of the order of said court overruling same (R. 31), all without objection, and rested.

Over the objections and exceptions of plaintiff that the answer stated no legal defense to the petition on the judgment (R. 38) the defendant was allowed to offer authenticated copies of portions of the files of the original suit and the testimony of its secretary, H. E. Rex (R. 40) seeking to prove by his testimony and conclusions that it had never done any business in Missouri, nor ever had any agent therein, all over the objections and exceptions of plaintiff as to competency, materiality or relevancy to any issue raised by the pleadings.

The foregoing was all the evidence offered, and the trial court thereafter filed its special findings of fact (R. 18), based upon the testimony aforesaid admitted over plaintiff's objections and exceptions, which findings were to the effect that defendant had never done any business in Missouri and never had any agent therein, and exactly contrary on the identical issues to the findings contained in the judgment sued on, embodying the overruling of defendant's motion to quash, and the trial court herein likewise filed its conclusion of law (R. 19), over plaintiff's exception allowed, ordering plaintiff's petition dismissed on the merits at her costs, in pursuance of which order judgment was entered, from which your petitioner perfected her bill of exceptions (R. 28) and appeal to said Cir-

cuit Court of Appeals, resulting in an affirmance there, now sought to be reviewed here.

IV.

Specifications of Errors.

The assigned errors intended to be urged are:

1. That the District Court erred in overruling plaintiff's objection to the introduction of any evidence under the defendant's answer on the ground that said answer does not state facts sufficient to constitute a defense to the petition of the plaintiff, and the Circuit Court of Appeals erred in not reversing such ruling.

2. That the District Court erred in finding for the defendant and in not finding for the plaintiff, upon the pleadings in the cause, upon which the case was tried by the court, and the Circuit Court of Appeals erred in affirming such District Court finding.

3. That the District Court erred upon the facts found by the court in finding for the defendant, and in not finding for the plaintiff, upon the judgment against defendant sued on by her, and the Circuit Court of Appeals erred in affirming such District Court ruling.

4. That the District Court erred in holding that the defendant was not estopped from questioning the judgment against it sued on herein by its having submitted by motion to quash service the question of the jurisdiction of the United States District Court for the Western District of Missouri over its person to said latter court and receiving after hearing a decision

of said court upholding its jurisdiction over the person of said defendant, remaining unappealed from and not set aside, and resulting in said judgment sued on herein, and the Circuit Court of Appeals erred in affirming such ruling.

5. That the District Court erred in permitting the defendant to make a collateral attack upon the judgment sued on herein of the United States District Court for the Western District of Missouri, after it had appeared in said latter court in the suit resulting in said judgment specially to submit therein the question of the jurisdiction of said court over its person, and said court had upon hearing of said question overruled said jurisdictional objections so submitted, and thereafter entered a final judgment by default against the defendant now sued upon herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

6. That the District Court erred in holding that the overruling, after hearing the evidence and argument of the parties thereon, of the defendant's motion to quash the service on it, by the United States District Court for the Western District of Missouri, was not *res judicata* of said court's jurisdiction over the person of defendant after resulting in the judgment against defendant which remaining unreversed and not set aside, sued on herein, although defendant appeared specially only in said first suit to raise and submit to said court jurisdictional issue, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

7. That the District Court erred in holding that the judgment sued on in this cause was subject to collateral attack therein by the defendant, and that the United States District Court for the Southern District of Iowa could in this action, over the objection and exception of plaintiff, receive evidence and substitute its findings thereon for those of the United States District Court for the Western District of Missouri, upon the issue of the latter's jurisdiction of the person of the defendant in the suit resulting in said judgment, although it appears therein and herein that defendant had appeared in said former suit and specially submitted to that said court said issue of jurisdiction of its person therein and said court had overruled defendant's objections to such jurisdiction after hearing thereon *inter partes*, and had thereafter entered final judgment against defendant in said cause and in favor of plaintiff, which judgment having remained unreversed and not set aside, is sued upon herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

8. That the District Court erred in denying to the plaintiff her constitutional rights under the Constitution of the United States, and particularly under the Full Faith and Credit Section I of Article IV thereof, and Sec. 905, Revised Statutes of the United States (Sec. 687, Title 28, U. S. C. A.), enacted in pursuance and by authority of said constitution, requiring the duly authenticated transcript of judgment sued on and offered in evidence herein to have such faith and credit given it in every court within the

United States, as it had by law or usage in the court of the state from which it was taken, in that the court herein denied to plaintiff recovery herein upon said authenticated judgment sued on herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

9. That the District Court erred in refusing to follow in this case the law or usage of the State of Missouri to the effect that a defendant who appears in a suit in a court, having jurisdiction of the subject matter of such suit, to question the court's jurisdiction over his person, and submits said question on evidence offered by it to said court, and allows such court's final judgment sustaining said jurisdiction to stand without reversal or setting aside, has had his day in court on said question of jurisdiction, and is estopped by such final judgment to question said jurisdiction, in an action on said judgment in every court within the United States, as this court erroneously permitted defendant herein to do over plaintiff's objection and exception, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

10. That the District Court erred in permitting the defendant over the objection and exception of plaintiff to adduce evidence seeking to show that it had never done any business in the State of Missouri, or within the jurisdiction of the court of the judgment sued on, nor ever had any agent in the State of Missouri, or within the jurisdiction of the court of the judgment sued on, when both the primary record and evidence herein showed that defendant had litigated all

said questions in the original suit in the Federal Court of the State of Missouri, and was estopped of record thereon by the overruling of its motion to quash service upon it by said latter court raising all said questions embodied in the final judgment of said United States District Court for the Western District of Missouri, standing unreversed and not set aside and sued upon herein, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

11. That the District Court erred upon the primary record of this cause in not finding that plaintiff was entitled to recover herein and in finding that defendant was entitled to have said cause dismissed with prejudice upon the merits at the cost of plaintiff, and the Circuit Court of Appeals erred in affirming such ruling of the District Court.

12. That the District Court erred upon the whole record in finding for the defendant and against the plaintiff as prayed by her, and the Circuit Court of Appeals erred in affirming and in not reversing such ruling of the District Court.

13. That the District Court erred in admitting in evidence the affidavit of O. C. Sheley filed in the Federal Court in Kansas City, on April 28th, 1925, offered in evidence upon the trial of this cause by the defendant over the objection of plaintiff that the same was incompetent, immaterial and irrelevant to any issue in the case, and the Circuit Court of Appeals erred in not reversing such ruling.

14. That the District Court erred in admitting in evidence the testimony of H. C. Rex, an officer of de-

fendant that defendant had never done any business in Missouri, nor ever had any agent therein, over the objection and exception of plaintiff, that such evidence was an attempt to attack collaterally the judgment sued on and pleaded, and that such testimony was incompetent, irrelevant and immaterial, and an attempt to readjudicate issues already adjudicated by the judgment pleaded and sued upon, and the Circuit Court of Appeals erred in not reversing such ruling of the District Court.

15. That the District Court erred in not holding that the defendant was also estopped from questioning herein the jurisdiction of the Missouri Federal Court to render the judgment sued on herein by reason of defendant's having filed in said court on June 17th, 1924, its motion as admitted by its answer herein, as an exhibit thereto, to dismiss said former suit for lack of diligent prosecution of same by plaintiff; and in not holding that the filing of said motion and submission of same to that court, constituted a general appearance by defendant in said cause, and the Circuit Court of Appeals erred in affirming and in not reversing such District Court ruling.

16. That the District Court erred upon the record herein in not finding that plaintiff was entitled to recover judgment herein against the defendant for the sum of $8,240.00 with six per cent (6%) interest per annum thereon from January 4th, 1927, to the date of rendition of judgment herein, plus $26.80 costs shown as costs taxed against the defendant, as shown in the authenticated transcript of judgment sued on, and

for the costs herein, and the Circuit Court of Appeals likewise so erred in affirming the District Court's judgment of dismissal of the petition on the merits at your petitioner's costs, and in not reversing such judgment and ordering judgment rendered for petitioner as above prayed by her.

17. The Circuit Court of Appeals erred in holding that the federal rule does not recognize the doctrine of estoppel by judgment *inter partes* of a federal court having jurisdiction of the subject matter involved, and such a judgment's immunity from collateral attack.

18. The Circuit Court of Appeals erred in holding that defendant's filing of a motion to dismiss for lack of diligent prosecution after quashal of first service, and before the later service, was not a general appearance, though recited as special.

19. The Circuit Court of Appeals erred in holding that it and the trial court could pass upon as a matter of law the sufficiency of the evidence in the court *a quo* to sustain such court's finding and judgment *inter partes* sued on herein, or retry such issue over plaintiff's objection and reverse such finding on collateral attack herein thereon.

20. The Circuit Court of Appeals erred in passing on the appeal herein as if it were an appeal from the judgment sued on instead of from a judgment sustaining a collateral attack thereon.

SUMMARY OF THE ARGUMENT.

Point A.

Special appearance is solely for the purpose of attacking the jurisdiction of the person, and limits the issue submitted thereto, but what it submits is adjudicated *inter partes*, if the court has jurisdiction of the subject matter of the action.

Point B.

Judgments *inter partes* of a competent court are not subject to any collateral attack whatsoever, even though they adjudicate the jurisdiction of the person of the defendant on special appearance only, and even though *ex parte* judgments are subject to jurisdictional inquiry when sued upon. Such *inter partes* judgments are entitled to full faith and credit.

Point C.

The lower courts herein have simply failed to distinguish between direct attacks by appeal or writ of error in the same case and a collateral attack made in another suit. Likewise they have confused jurisdictional inquiries upon first appearance of the defendant in the matter involved with a second appearance of a defendant to question a jurisdiction already adjudicated at its own instance in the first proceeding had. Due process calls for one day in court only.

Point D.

The decision below is contrary to and in conflict with all prior federal and state court decisions on a like state of facts, and with all text writers likewise.

Point E.

A motion to dismiss for lack of diligent prosecution is a general appearance even though recited to be special, the defendant having become an actor in the case by filing such motion.

ARGUMENT.

Point A.

Special Appearance Adjudicates Inter Partes What It Submits.

The unprecedented decision of the Circuit Court of Appeals herein seems due wholly to confusion of thought.

Because the federal courts are liberal in allowing special appearances to object to jurisdiction of the person of defendant, and in allowing appeals from rulings thereon even after defense on the merits, when the exception is saved, the trial and appellate courts herein have erroneously assumed that the overruling of such objections by a court having jurisdiction of the subject matter of the suit is not *res judicata* thereon, even though such ruling is incorporated in a final judgment of the court.

There is neither reason nor precedent for their position, as in all courts a special appearance, while limiting the primary issue thereon, submits the jurisdictional issue to the court and its judgment thereon is final until set aside, or reversed on direct attack by appeal or writ of error therefrom, and is not subject to collateral attack within the United States unless a lack of jurisdiction of the subject matter is shown. *Toy Toy* v. *Hopkins*, 212 U. S. 242; *Hancock Nat'l Bank* v. *Farnum*, 170 U. S. 640, 645.

Point B.

Judgments Inter Partes of a Competent Court Are Not Collaterally Assailable.

Because judgments taken in wholly *ex parte* proceedings, where there was no appearance of the defendant, are subject to jurisdictional inquiry when sued upon, as are also those taken in cases where there is a lack of jurisdiction of the subject matter, notwithstanding there might be either special or general appearance, in order that defendant have a day in a competent court, the Circuit Court of Appeals and District Court have erroneously assumed that the judgment of a competent court rendered *inter partes* is likewise subject to collateral attack as against estoppel by judgment, even when sued on under the full faith and credit clause of the Constitution, and the Acts of Congress enacted by authority thereof, and even on a judgment coming from a State holding such a judgment conclusive. *Hall* v. *Wilder Mfg. Co.*, 316 Mo. 812, 52 A. L. R. 723, 740, citing *Baisley* v. *Baisley*, 113 Mo. 544.

Point C.

The Cases Cited Against Petitioner Are Not Apposite.

The confusion of the courts below herein is also shown by their citations of cases not apposite. They cite no case upholding such a collateral attack as herein, because there is none such in the books, a fact we confidently assert. Their citations are all of cases of *direct* attack on appeal or writ of error, or cases of no appearance at all by defendant in the court

of the judgment sued on, or cases of unauthorized appearance therein by attorney, or cases wherein the subject matter of the original action is not within the jurisdiction of the court, whose judgment is questioned, the latter usually being actions *in rem* or *quasi in rem*. We repeat that there is no case in the books other than the one at bar upholding a collateral attack on a judgment *inter partes* rendered by a court having jurisdiction of the subject-matter.

In *National Exchange Bank* v. *Wiley*, 195 U. S. 257, cited, the issue turned on the validity of the exercise of a power of attorney to enter appearance in the court *a quo* by a holder, not *owner*, of the judgment note. In *Haddock* v. *Haddock*, 201 U. S. 562, also cited, the report thereof shows Mrs. Haddock served by publication only and that she did not appear in the court *a quo*. Likewise in *St. Clair* v. *Cox*, 106 U. S. 350, and *Compagnie Du Port, etc.* v. *Mead Morrison Mfg. Co.*, 19 F. (2d) 163, the reports show service attempted on purported agents of the corporations sued, but no appearance by either whatsoever in the court *a quo*. Of course, never having tried out or waived the jurisdictional question, all such defendants were entitled to a day in court so to do, when such judgments were invoked against them, but no defendant is entitled to a second day in court to try out again what he has already submitted to a competent court and after hearing has been adjudicated against him.

We have discussed the trial court's opinion (R. 19) *in extenso* in our "Brief for Appellant" herein,

and likewise the Circuit Court of Appeals' opinion in our "Suggestions in Support of Petition for Rehearing," with quotations from our authorities cited *supra* herein, supporting your petitioner's position, with discussions of the lower court's citations, and we are filing nine copies of these briefs herewith that they may be available to the justices of this court in case they care to satisfy themselves of the accuracy of our assertions as to the cases cited in the case at bar. Said briefs are marked respectively "Appendix 1 and Appendix 2" to petition for certiorari herein.

Point D.

All Reported Authority, Including the Decisions of This Court and the Second and Sixth Circuit Courts of Appeals, Is Opposed to the Decision Rendered Below.

Under JURISDICTION (d), *supra* herein, we have cited most of the pertinent decisions on the question of immunity from collateral attack of judgments *inter partes* by courts having jurisdiction of the subject-matter in order to show that the decision below is contrary to the overwhelming weight of authority. From our research we confidently assert that it is a pioneer in the revolutionary doctrine it proclaims. For brevity's sake we forbear discussion of these cases herein, but all will be found supporting our position, which seems to us to rest upon the most fundamental rule of jurisprudence, that every court must be bound by the final unreversed judgment *inter partes* of a court, which had jurisdiction of the subject matter involved.

Point E.

The Volunteer Motion to Dismiss as a General Appearance.

The volunteer motion of the defendant to dismiss, when there was no process outstanding in the case, seems to present a case of first impression on whether such filing was a general appearance, although recited to be special. There is no doubt that motions to dismiss have been filed in former federal practice as motions to quash or set aside the service, which this court said in *Harkness* v. *Hyde*, 98 U. S. 476, was the proper form of attack on jurisdiction of the person, and so treated the motion to dismiss therein. Also prayers to dismiss have been joined with motions to quash or set aside the service. But now we have a new statute of April 16, 1920 (28 U. S. C. A., Sec. 83), applying to removed cases allowing the retention thereof, after quashal of service, for issuance of alias writs to perfect defective service. In our "Brief for Appellant," filed herein as "Appendix 2" (pp. 54-62), we have discussed this question, quoting on page 57 therein, 2 Cyclopedia of Federal Procedure, 210, Sec. 330, so we do not repeat this herein for brevity's sake.

In *Thomas Marine Ins. Co.* v. *U. S.*, 237 U. S. 19, is said:

> "Defendant becoming actor in cause as test of general appearance is the rule of the United States Supreme Court."

It seems to us that the Circuit Court of Appeal's discussion of this issue is solely from a defendant's

view, and overlooks a plaintiff's rights given by the statute to make full effort to serve agents of foreign corporations who may be doing business in plaintiff's domicile, as commented on by this court in *Lumbermen's Ins. Co.* v. *Meyer*, 197 U. S. 407 (Syl. 3), 419. We feel that this court should construe the recent statute, *supra*, and that this question of practice is important, even if not so imperatively so as the main question of *res judicata* herein by a judgment *inter partes* by a competent court whose ruling the respondent itself had invoked and therefore was bound thereby upon the question of jurisdiction as well as upon the merits.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this court of its supervising powers, and that this court should issue a writ of certiorari herein.

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